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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

SEP - 9 1997

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)
Implementation of the Pay Telephone)
Reclassification and Compensation)
Provisions of the Telecommunications)
Act of 1996)

CC Docket No. 96-128

**REPLY COMMENTS OF
GE CAPITAL COMMUNICATION SERVICES CORPORATION**

GE Capital Communication Services Corporation ("GECCS")¹ files these
Reply Comments in response to the Public Notice released August 5, 1997.²

In the Public Notice, the Commission sought comment on several issues
raised by the United States Court of Appeals for the District of Columbia Circuit
remand³ of FCC Orders⁴ ("*Payphone Orders*") adopting new rules governing
payment of compensation to payphone service providers ("PSPs"). In particular,
the Public Notice requested comment regarding a payment mechanism for the

¹ GECCS is a reseller of telecommunications services purchased from facilities-based carriers.

² *Pleading Cycle Established for Comment on Remand Issues in the Payphone Proceeding*, CC Docket No. 96-128, DA 97-1673 (rel. Aug. 5, 1997) ("Public Notice").

³ *Illinois Public Telecommunications Association v. FCC et al.*, 117 F.3d 555 (D.C. Cir. 1997) ("*Remand Order*").

⁴ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 20541(1996) and Order on Reconsideration, 11 FCC Rcd 21233 (1996).

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so-called "interim period" from October 1996 to October 1997, the first year of the Commission's new compensation rules. After October 1997, the *Payphone Orders* establish a per call compensation mechanism. In the Public Notice, the Commission asked interested parties to comment on the proper aggregate amount of compensation PSPs should receive during the interim period, the companies who should be required to pay the interim compensation, and the appropriate measure for allocating compensation among contributors.⁵

GECCS supports those commenters who maintain that the appropriate payphone compensation mechanism during the interim period is that established by the Commission's rules prior to the release of the *Payphone Orders*. GECCS agrees with those commenters⁶ who argue that the interim payphone compensation mechanism established in the *Payphone Orders* has been rejected by the D.C. Circuit Court in the *Remand Order*. In that case, the Court of Appeals found that the Commission's decision to impose the same per call charge on coinless calls that it found appropriate for local coin calls "epitomizes arbitrary and capricious decisionmaking."⁷ The Court also found the interim compensation plan "arbitrary and capricious" because (a) the FCC "cites no reasonable justification for an interim rate based on \$.35 per call," (b) the FCC did not adequately justify exempting all but large carriers from the obligation to

⁵ Public Notice at 3-4.

⁶ WorldCom, Inc. ("WorldCom") Comments at 1-2; Competitive Telecommunications Association ("CTA") at 3-8; AirTouch Paging ("AirTouch") at 4-5; Personal Communications Industry Association ("PCIA") at 2-7; LCI International Telecom Corp. ("LCI") at 2-3.

⁷ *Remand Order*, 117 F.3d at 564.

contribute to the interim compensation mechanism, and (c) the Commission did not justify basing interim contributions on toll revenues.⁸ GECCS agrees that the Commission cannot give effect, retroactive or otherwise, to rules which have been adjudicated as "arbitrary and capricious," and therefore unlawful by the D.C. Circuit.

The Court of Appeals currently has pending before it a petition filed by interexchange carriers asking the Court to clarify that it intended to vacate the interim compensation mechanism established in the *Payphone Orders*. If the *Remand Order* vacated that part of the *Payphone Orders* which established the interim compensation plan, then the carriers' respective payment obligations during that period are properly governed by the Commission's rules as they existed prior to the effective date of the modifications made by the *Payphone Orders*. Moreover, since the one-year "interim" period will have ended by the time the Commission issues its decision on remand in this docket, the Commission should no longer concern itself with establishing a replacement mechanism for that period. Rather, since the remand left untouched the Commission's requirement that carriers convert to a "per call" mechanism beginning October 7, 1997, the Commission should simply transition directly from the prior rules to the per call compensation system on October 7, 1997.⁹

⁸ *Id.* at 564-565.

⁹ As several commenters noted, nothing in Section 276 of the Telecommunications Act of 1996, as amended, which was the impetus for the *Payphone Orders*, requires that the rules promulgated under Section 276 be effective by a particular date. See Sprint Comments at 12; MCI Comments at 6. The Commission's efforts and resources would be better spent establishing an equitable, well-justified per call rate for the second year and thereafter, rather than beginning

If the Court of Appeals announces that the Commission's new rules for the interim period were *not* vacated pending FCC action in response to the remand order, then the Commission should modify its interim compensation scheme in response to the remand by relying on actual calling data rather than toll revenues to calculate carrier contributions and impose a contribution obligation on facilities-based carriers only.

In its decision, the Court of Appeals struck down the Commission's usage of toll revenues as the measure for allocating compensation for dial around and toll free calls during the interim period. The Court found that the Commission had failed to establish a nexus between toll revenues and the number of payphone-originated calls for which IXCs must pay fair compensation. The Court's action recognizes that a carrier with toll revenues of a million dollars could be responsible for more payphone calls than a carrier with one hundred million dollars in toll revenues. The Commission should therefore reject any proposals that attempt to resurrect toll revenues as an appropriate methodology.¹⁰

GECCS supports adoption of a compensation scheme for the interim period which relies on data regarding the number of toll-free and access code calls to ensure that compensation obligations are equitably allocated. GECCS therefore supports Sprint's proposal to rely on actual calling data from the period

the administratively complex and costly task of trying to design a mechanism for a year that will have already passed and for which no per call data exists.

¹⁰ See, e.g., RBOC/GTE/SNET Payphone Coalition ("Coalition") Comments at 34; MCI Comments at 7; AT&T Comments at 20-21.

following October 7, 1997 as a surrogate for calling data during the interim year.

Sprint suggests that the Commission require carriers who pay per call compensation to calculate the number of toll-free and access code calls made during the first full month of the first year for which carriers are obligated to track payphone calling, *i.e.*, November 1997; divide the number of actual calls by the total number of payphone lines; and use that calls-per-line number to determine their share of the compensation due per payphone line for the interim year.¹¹

Because calling volumes may vary over the course of a year, however, GECCS would modify the Sprint proposal by relying on data from the complete first year of the per call mechanism. In addition, the Commission should treat the calls per line figure derived from the data as a rebuttable presumption which carriers can challenge with persuasive evidence that the figure derived from their second year calling data is a *material* departure from their calling volumes for the interim year.¹²

GECCS also urges the Commission to impose compensation obligations for the interim year on *facilities-based* carriers only, including both interexchange carriers and local exchange carriers.¹³ As the Telecommunications Resellers Association ("TRA") properly argued, any compensation mechanism which includes non-facilities-based resellers will result in a double payment by the

¹¹ See Sprint Comments at 12-13.

¹² As noted by the International Telecard Association ("ITA") -- and consistent with the explicit language of Section 276 of the 1996 Act -- it also is imperative that the data used includes only compensable *completed* calls. ITA Comments at 11.

¹³ *Id.* at 9.

reseller for each compensable call – first to the PSP, and second to the underlying carrier with whom the reseller contracts, who will then reflect *its* payment to the PSP in the rates paid by the reseller.¹⁴ The notion of “fair” compensation necessarily contemplates that *contributions* toward that compensation are fair as well. Any mechanism that compels double payment by a particular contributor is inherently *unfair*, and therefore in contravention of Section 276.¹⁵

Finally, GECCS agrees with commenters who advocate an exemption for potential contributors whose contribution would be *de minimis*. In such cases, the administrative costs of compliance would outweigh the carrier’s contributions.¹⁶ As with the actual compensation obligation, however, any such exception should not be based on toll revenues,¹⁷ but on the carrier’s estimated annual payphone contribution.

¹⁴ TRA Comments at 8-9.

¹⁵ See 47 U.S.C. § 276(b)(1)(A).

¹⁶ See, e.g., ITA Comments at 9.

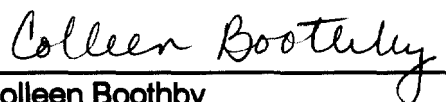
¹⁷ See Coalition Comments at 34, which proposed exempting all carriers whose monthly toll revenues are less than \$1 million.

CONCLUSION

For the reasons stated above, GECCS urges the Commission to adopt interim compensation rules on remand that are consistent with the foregoing comments.

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162.05/RPY Payphone Remand

CERTIFICATE OF SERVICE

I, Kurt A. Kaiser, hereby certify that true and correct copies of the preceding Reply Comments of GE Capital Communication Services Corporation in CC Docket No. 96-128, were served this 9th day of September, 1997 via hand delivery upon the following parties:

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